

# Lies in Politics

---

Maximilian Steinbeis

2019-06-01T13:45:18

In the USA, the case for the impeachment of Donald Trump gets stronger every day. In Austria, there will be interim summer government of constitutional lawyers and judges. And in the UK, Boris Johnson will have to answer for his lies in court. Not a bad week from the point of view of constitutional law, one might think. We tend to sympathize with the idea of using the law as a high-pressure hose to flush the dirt out of politics, and when it comes to figures like Trump and Johnson, that idea seems to be even more attractive. To have an orderly legal procedure establish that politicians mustn't do what we think they shouldn't do appears to us to be a perfect fulfilment of the constitutional promise to put the reins of law on the power of the rulers.

But this legalistic instinct, so typically German, is easily misleading. The Johnson case seems to me to be a prime example of this.

## Misconduct in public office

It was indeed an outrage what the Vote Leave campaign with Boris Johnson at its helm had the nerve to write on that iconic red campaign bus in letters three feet high: that the UK transferred £ 350 million to the EU every week, which could be poured into the underfunded National Health Service after Brexit. That was a bald-faced lie on so many levels that it makes me shudder with disbelief even three years later.

A 29-year-old businessman named [Marcus Ball](#) has spent two and a half years collecting material and nearly £ 300,000 of crowdfunding capital to bring Boris Johnson to justice for this. Under British [criminal procedural law](#), in principle any private individual can act as a prosecutor, provided he has sufficient evidence. The offence Johnson is accused of by Ball is "misconduct in public office", a British [common law offence](#) which, in extreme cases, is punishable by life imprisonment. The elements of that crime are

1. a public officer acting as such, who
2. wilfully neglects to perform his duty/or wilfully misconducts himself
3. to such a degree as to amount to an abuse of the public's trust in the officeholder, and
4. does so without reasonable excuse or justification.

++++A Note from Humboldt University++++



## **Juristische Fakultät**

**Wissenschaftlicher Mitarbeiter (m/w/d) – E 14 TV-L HU (Drittmittelfinanzierung befristet bis 31.03.2024; Einstellung zum 01.10.2019 beabsichtigt) – Kennziffer DR/095/19**

*Aufgabengebiet: Wiss. Dienstleistungen in der Forschung im Rahmen des DFG-geförderten Graduiertenkollegs „Dynamische Integrationsordnung (DynamInt)“, GRK 2483; Zusammenarbeit mit dem Integrated Research Institute (IRI) „Law and Society Institute“*

Den ausführlichen Ausschreibungstext finden Sie unter [www.personalabteilung.hu-berlin.de/stellenausschreibungen](http://www.personalabteilung.hu-berlin.de/stellenausschreibungen) unter der angegebenen Kennziffer.

++++++Paid Advertisement++++++

Johnson was not just an MP during the Vote Leave campaign, but most of the time also Mayor of London. His oath of office as mayor and the parliamentary rules of conduct prohibited Johnson from spreading lies, argues the private prosecutor Ball: He had violated this duty and used the platform these offices offered him to spread the 350 million flam while his mentioning of all sorts of different sums proved that he knew that number to be false.

Whether all of this adds up factually and legally is not yet decided. The Westminster Magistrates' Court has so far only [determined](#) that it considers the allegation of misconduct in public office prima facie sufficiently substantiated to summon Johnson for a court hearing. But the scandal is already perfect: In the middle of the race for the Tory chair and thus the power of government, Boris Johnson has to defend himself in court against the accusation of being not just a liar, but a criminal.

## **Truthfulness as a campaign matter**

Personally, there are rather few bad things I wouldn't wish to happen to Boris Johnson for his role in the Brexit campaign. But a criminal trial is one of them – not so much for Boris Johnson's and his individual right to free speech's sake (as if there was such a thing as a right to lie) as for the sake of democracy and the rule of law.

Lying is a crime in many situations: in your tax returns, in court, in a police investigation. To deliberately tell an untruth is a punishable act where it is necessary to protect the confidence in the truthfulness of the speaker because if you can't take

him on his words things would just fall apart. An election campaign, however, is not such a situation: no-one has to take an election campaigner – unlike an office holder – on his words. On the contrary. Protection of confidence is completely unwarranted here. Election campaigners have to win the confidence of the voters, not to take it for granted – that's what they are campaigning for. Truthfulness is not a prerequisite, but the subject of political competition. That is why, in a functioning democracy, few things are usually more damaging for a politician's career than to be caught lying.

+++++A Note from JuWiss+++++

### **JuWissDay 2019 – 10 Jahre Vertrag von Lissabon**

*Das europäische Wahlvolk hat gesprochen – aber wie geht es weiter mit der Europäischen Union und ihrem Recht? Welche Reformen müssen jetzt angepackt werden? Diskutieren Sie mit uns auf der Tagung „Zehn Jahre Vertrag von Lissabon. Reflexionen zur Zukunft der europäischen Integration“ am 21. Juni 2019 in Berlin! Das Programm und Informationen zur Anmeldung finden sich [hier](#).*

+++++Paid Advertisement+++++

But isn't that exactly what's not working any more? Being caught lying, it seems, is no longer a career-ending offence for a politician at all, on the contrary. Donald Trump has hardly missed a day in the last three years without bestowing another big, fat lie upon the world, and not just did his very untruthfulness win him one term of office, it might even win him another in 2020! The same might apply *mutatis mutandis* to Boris Johnson. If it's as bad as this, isn't it absolutely imperative to call for the law to intervene?

Maybe. But if you already have a dysfunctional democracy you might want to think twice before doing damage to the rule of law, too. That is what you'd do, however, if you put the judiciary in charge of ensuring truthfulness in election campaigns. The possibility of establishing one's own or one's opponent's truthfulness in court would immediately become a political tool for both sides: The lying politician can, if there is insufficient evidence that what he says is untrue, give his lies the appearance of judicially established truth. This may also apply to Boris Johnson: The argument of his lawyers that Johnson did at any rate not lie *in discharge* of his official duties may very well win the day in the end. It's not hard to imagine what his spin doctors will do in the not unlikely case of an acquittal.

That Johnson, despite his lies, has prospects of becoming prime minister is an indicator of the epochal constitutional crisis in which the UK finds itself. Brexit is "Britain's constitutional time-bomb", to quote the title of the highly recommended Economist [front page story](#) of this week. And if that bomb goes off, possibly with Johnson in power, the country will be in dire need of an undamaged judiciary.

## **Illiberal conservatism**

In **Germany**, the leader of the conservative party and head of government *in spe* is Annegret Kramp-Karrenbauer, and as far as we know, she did not herself do things

that were or should be forbidden during the election campaign, but sees herself as a victim of those instead: A popular Youtube star published a searing attack on the CDU's climate policy record just before the EU elections, which caused its chairwoman to publicly contemplate regulating electoral *Meinungsmache* ("opinion making") in the digital sphere. [JULIAN SCHOLTES](#) is reminded of Viktor Orbán by these ideas and warns against conservatives turning to illiberal authoritarianism.

This is fateful moment after the **European** elections in Brussels, where the Council and Parliament are wrestling over whether the Commission Presidency should go to one of the EP *Spitzenkandidaten* or to someone to the taste of the heads of government. [MARK DAWSON](#) believes that, despite all the problems of the Juncker era, it is far from clear that the *Spitzenkandidaten* experiment and the "political commission" were a failure, and warns against a premature end of this attempt to democratise the Union.

The fact that so many voters abroad were not allowed to cast their ballot – most of all expatriate **Romanians** who seem to have been systematically deprived of their vote by the beleaguered SDP/ALDE government – has put a visible dent into the legitimacy of these EP elections. [BIANCA SELEJAN-GUTAN](#) sees the election result nevertheless as a strong statement of the Romanians for Europe and against populism and corruption and the fact that so many of them were prevented from participating as proof of its necessity. [LAURENT PECH, VLAD PERJU and SÉBASTIEN PLATON](#) analyse the possibilities for the EU Commission to take action against the Romanian government and make an innovative proposal.

The European Court of Justice this week gave the **German** judicial system a moment of self-reflection with its ruling that German prosecutors are not independent enough to issue EU arrest warrants. [KLAUS FERDINAND GÄRDITZ](#) suspects that the CJEU's stance reflects the predominance of the French judicial system in Luxembourg and regrets that the Court did not see the reasonableness of the German system.

In the case of *Mammadov v. Azerbaijan*, the European Court of Human Rights in Strasbourg has ruled for the first time against a member state for not having implemented a previous ECtHR judgment. [BASAK CALI](#) examines how the Court has discharged itself of this delicate task.

The **German** Federal Court of Justice seems as well to be sometimes worryingly lax with respect to the case-law of the European Court of Human Rights, according to [BARBARA SEELING's](#) analysis of a recent decision on compensation for unlawfully imposed deportation detention.

The election board of **Turkey** has published its reasons for its decision to annul the mayoral election in Istanbul after the defeat of the ruling AKP party. For [BERTIL EMRAH ODER](#) the whole process shows how the AKP manipulates electoral law in the interest of retaining its power.

In **Germany**, the anti-Semitism commissioner of the federal government has caused an uproar with his warning that Jews can't publicly wear a Kippa everywhere without

a risk of being assaulted. [ANDREW MARK BENNETT](#) adds to the debate the voice of a directly concerned person: "I want Germany to recognize ... that the average kippa-wearing Jew has hidden his kippa under a hat in Germany for years. We do so in accordance with our assessment of the risks. Our decisions deserve to be taken seriously. They should inspire a durable response of substance, not a temporary performance of solidarity", particularly before the background of the various so-called "neutrality laws" (vulgo headscarf ban) by which the state itself participates in banning Orthodox Jews from wearing their religious headgear in public.

The injunction by the **German** Federal Constitutional Court against the Facebook ban of a neo-Nazi party indicates, in the opinion of [ERIK TUCHTFELD](#), that this case could produce a fundamental judgment on the binding effect of fundamental rights on the operators of social networks.

A big event on Verfassungsblog this week was the online symposium on **Poland** we had organized together with Democracy Reporting International and the *Re:Constitute* project of the Mercator Foundation. The aim of the debate was to discuss the options of the European Court of Justice for its epochal ruling on forced retirement in the Polish judiciary. Following the introduction by [JAKUB JARACZEWSKI](#), [MACIEJ TABOROWSKI](#) and [PAWEŁ MARCISZ](#) predict that Poland will lose the case and that the backing down of the PiS government will not suffice to implement the judgment. [FEMKE GREMMELPREZ](#) examines the likely impact on the EU's rule-of-law instruments. [LUKE DIMITRIOS SPIEKER](#) describes which existing ambiguities in the CJEU case law on the fight against rule-of-law backsliding the ruling could remedy. [KAROLINA PODSTAWA](#) points out from a Polish perspective that the ruling alone will have little effect without more far-reaching sanctions from the EU Commission. We expect ANNA SLEDZINSKA-SIMON and PÉTRA BARD to make a further and final contribution to this symposium.

## Elsewhere

[THOMAS PERROUD](#) appreciates the decision of the **French** Constitutional Council to disclose the content of external contributions in the future.

[DORJANA BOJANOVSKA POPOVSKA](#) questions the role of religious organisations in the legislation of the secular state on the occasion of the recent liberalisation of abortion law in **Northern Macedonia**.

[RÉGIS DANDOY](#) is concerned about the electoral success of the radical right in **Belgium**.

[REBECCA ZAHN](#) examines a CJEU ruling on whether **Greece** can refuse monks admission to the bar.

[ELENI FRANTZIOU](#) demands consequences from the mass denial of the right to vote for EU citizens in the **UK**.

[AMICHAH COHEN](#) considers the dissolution of the parliament to be the latest crisis symptom of **Israeli** constitutional institutions.

[PIERRE DE VOS](#), in line with the topic of this editorial, analyses a judgement of the High Court of **South Africa** on political lies on Twitter.

[GAUTAM BHATIA](#) criticizes the Constitutional Court of **Kenya** for declaring the criminalization of homosexuality constitutional.

[ANA TERESA DUARTE LIMA DE BARROS](#) is alarmed about the attacks on public universities in **Brazil** under Bolsonaro.

[JORGE CONTESSE](#) reports on the unprecedented decision of the Supreme Court of **Chile** on the direct effect of the jurisdiction of the Inter-American Court of Human Rights.

[ALONSO GURMENDI](#) is, in light of recent events, offering to the **US** the Latin American experience about the reversal of pardons and amnesties for war criminals.

[ANUPAM CHANDER](#), modifying a famous Churchill quote, considers the idea of a **Facebook** Supreme Court to be the worst solution apart from all others.

So much for this eventful week. All the best, and take care,

Max Steinbeis

